Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney
for the City and County of
San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

LOUISE H. RENNE
City Attorney
Counsel of Record
DENNIS AITERGUT
THOMAS J. OWEN
Deputy City Attorneys
206 City Hall
San Francisco, CA 94102
(415) 554-4213

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

RESPONDENTS' AND AMICI'S ARGUMENT IS BASED ON A FAULTY READING OF THE HISTORY OF PARTY ENDORSEMENTS IN NONPARTISON ELECTIONS 2

THE REASONING OF *LETTER CARRIERS* IS NOT LIMITED TO CIVIL SERVICE EMPLOYEES 4

THE REASONING OF *AUSTIN* APPLIES TO THIS CASE 7

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) 7, 8, 9

Buckley v. Valeo, 424 U.S. 1 (1976) 5

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 4, 6

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 6

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 8

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 9

Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984) 4, 6

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 4

Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) 4

Unger v. Superior Court, 37 Cal.3d 612 (1984) 2, 7

STATUTES

California Constitution
Article II, section 6(b) 3

Miscellaneous
Lee, *The Politics of Nonpartisanship* (1960) 2, 3

No. 90-769

In The

Supreme Court of the United States

October Term, 1990

LOUISE H. RENNE, City Attorney
for the City and County of
San Francisco, *et al.*,

Petitioners,

v.

BOB GEARY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

Petitioners Louise H. Renne, City Attorney for the City and County of San Francisco, *et al.*, respectfully submit this reply to certain arguments raised in the opposition briefs filed by Respondents Bob Geary, *et al.*, and Amici California Democratic Party, *et al.*

RESPONDENTS' AND AMICI'S ARGUMENT IS BASED ON A FAULTY READING OF THE HISTORY OF PARTY ENDORSEMENTS IN NONPARTISAN ELECTIONS.

Both Respondents and Amici emphasize Petitioners' "failure" to produce evidence of any evil resulting from party endorsements in nonpartisan elections before the voters specifically banned such endorsements in 1986. *See* Respondents' Brief, at 4-7; Amici's Brief, at 7, 17. Citing Justice Mosk's statement that before the ban, "it [was] customary for the governing bodies of political parties to endorse or assist candidates in elections for nonpartisan office," *Unger v. Superior Court*, 37 Cal.3d 612, 616 (1984), Respondents assert that the absence of any proven harm demonstrates that a prohibition on such endorsements is unnecessary to protect nonpartisanship or good government.

This argument, and the Ninth Circuit's opinion, perpetuate Justice Mosk's misreading of the study on which he relied. *Id.*, at fn. 7, citing Lee, *The Politics of Nonpartisanship*, Tables 32 and 33 at 103 (1960) [attached as Appendix A to this brief]; *see also*, App. to Petition, at A-8 – A-9, A-14. Lee's survey does not show that party endorsements were customary before section 6(b) was enacted.

The question asked in Lee's survey was this: "In any election for city, county, or school office (not state or national office) in your county in the last four years, has there been any public or openly visible activity on the part of either political organization: county committee, local political clubs, party officials or representatives,

etc.?" [Emphasis omitted.] Lee, at 102-03, 201. Survey respondents in only 11 of 44 counties (25%) and 18 of 192 cities (9%) answered affirmatively. *Id.*, at 102-03. Endorsements occurred in at most 4 of 44 counties (9%) and in at most 13 of 192 cities (7%). *Id.*, Table 33 at 103. Given the wording of the questions asked in the survey, even these endorsements may have been made either by non-official political clubs (as opposed to central committees) or by party officials in their individual capacity.[1] Such endorsements would not be proscribed by section 6(b). Furthermore, none of Lee's data address judicial elections, and the data collected applies only to a four-year period in the late 1950s.

Thus, Lee's results provide no basis for concluding that party endorsements were customary before 1986. Indeed, the study supports the opposite conclusion: party endorsements in nonpartisan races occurred at most sporadically. Even the Ninth Circuit *en banc* court recognized that local party organizations in the vast majority of counties in California did *not* endorse in nonpartisan races even before section 6(b) was enacted. App. to Petition, at A-1.

Respondents are therefore wrong in asserting that California's tradition of independent local politics is unrelated to the state's limits on partisan political activity. From 1913 to 1986, California's political parties by and large refrained from the partisan activity that section 6(b) forbids. The absence of any history of bossism or machine

---

[1] Similarly, fundraising occurred in at most 7 of the 44 counties (16%) and at most 9 of 192 cities (5%). Lee, Table 33 at 103. Again, it is unclear whether these were funds raised by official parties or unofficial political clubs.

politics actually demonstrates the benefits which result when official parties do not endorse in local and judicial elections. As Judge Trott wrote in the original panel decision, "The durability and efficacy of a solution should not be used as a reason to ignore its *raison d'etre*." App. to Petition, at A-97.

This Court has repeatedly rejected the argument that "a State's political system [must] sustain some level of damage before the legislature [may] take corrective action." *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). In *Munro*, the Court held that a state was not required to make a particularized showing of actual harms suffered prior to the imposition of reasonable restrictions on ballot access. 479 U.S. at 194-95. Thus, even in the absence of definitive evidence on this issue, the voters of California are entitled to act on the basis of their reasonable belief that partisan endorsements are incompatible with a system of nonpartisan elections. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (lawmakers may assume without scientific data that exposure to obscene material adversely affects individuals and society).

THE REASONING OF *LETTER CARRIERS* IS NOT LIMITED TO CIVIL SERVICE EMPLOYEES.

Respondents argue that this Court has rejected all attempts to extend the reasoning of *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) to persons or "independent, nongovernmental entities rather than . . . the Government's own employees." *See* Respondents' Brief, at 16, quoting *Federal*

Communications Commission v. League of Women Voters, 468 U.S. 364, 401 fn. 27 (1984). In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), however, this Court specifically relied upon *Letter Carriers* in upholding government limitations on campaign contributions:

> In *CSC v. Letter Carriers, supra*, the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." [Citations omitted.]

424 U.S. at 27. Thus, Respondents' assertion that the reasoning of *Letter Carriers* has been limited to the context of federal employees is simply incorrect.

Amici also challenge Petitioners' reliance upon *Letter Carriers*. Amici first argue that the *Buckley* Court "specifically *rejected* the argument that an interest in impartial government justifies a ban on endorsements in *partisan* elections." [First emphasis in original, second emphasis added.] *See* Amici's Brief, at 13. Amici also argue that the *Buckley* Court held that *"Letter Carriers* specifically preserved the right of persons to express their opinions publicly during candidate elections. . . . " *Id.*

Neither point is persuasive. As to the first, we are not dealing here with *partisan* elections.[2] As to Amici's second point, it is one which no one disputes: the Hatch Act did not restrict the right of government employees to make their individual views known, but merely restricted the employees' associational rights to participate in partisan political campaigns. *See Letter Carriers, supra,* 413 U.S. at 568 and fn. 15, 575-76, 579. Similarly, while section 6(b) restricts the collective rights of persons associated in official parties, it places no limitations on individual expressions of opinion.

Finally, Respondents' reliance on *League of Women Voters, supra,* fails. There, the Court invalidated a statute prohibiting editorializing by public television stations. Significantly, however, the plaintiffs in that case did not even challenge the portion of the statute prohibiting stations from supporting or opposing candidates for public

---

[2] In urging that the decision in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989), controls this case, Amici assert that any distinction between endorsements in partisan and nonpartisan races is immaterial. *See* Amici's Brief, at 4-6. Amici rely heavily upon the Ninth Circuit's statement that "there is nothing in this Court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon that fact that partisan offices were at issue." App. to Petition, at A-6.

The absence of such a suggestion, however, proves nothing. The question in *Eu* was whether the interests California offered for banning party endorsements in party primaries were compelling. In answering that question negatively, this Court and the Ninth Circuit properly did not attempt to analyze California's very different interest in banning endorsements in nonpartisan elections.

office, and the Court indicated that such a challenge would make a different case. 468 U.S. at 371 fn. 9.

THE REASONING OF *AUSTIN* APPLIES TO THIS CASE.

Respondents and Amici both attempt to distinguish *Austin v. Michigan Chamber of Commerce,* 110 S.Ct. 1391 (1990), arguing that the analogy to corporations and their state-conferred abilities to accumulate capital is flawed. *See* Respondents' Brief, at 11-12; Amici's Brief, at 14-16. They assert that *Austin* only applies to examples of disproportionate financial influence, and that political parties do not present the same threat to the political process.

Respondents' and Amici's reading of *Austin* is too narrow. While that case involved the regulation of corporate political activity in the context of state-conferred economic benefits, the *Austin* Court's concerns were far broader. The Court's fundamental point was that the state had a compelling interest in eliminating the potential for those entities enjoying state-conferred advantages to distort the political process.

Here, the state-conferred advantages are *political* rather than *economic*. The evil addressed by section 6(b) is disproportionate *political* influence in the nonpartisan context. Section 6(b) only restricts endorsements or partisan activity by those organizations which enjoy statutory political advantages by virtue of their status as official parties. It does not limit endorsements or partisan activity by those political organizations which do not take advantage of those statutory privileges.

Citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), Respondents and Amici argue that the influence of official parties derives from their political popularity, not from their success in the economic marketplace. *See* Respondents' Brief, at 12; Amici's Brief, at 15. But *MCFL* is easily distinguished. The regulation there was like the one in *Austin*; it restricted political expenditures by corporations. The Court found no compelling interest in applying such regulation to advocacy organizations which do not use their corporate, statutory benefits to *economic* advantage. 479 U.S. at 263-64. Here, by contrast, the statutory advantages are not economic but political, and the state has a compelling interest in preventing official parties from using those advantages to distort the nonpartisan political process.

Respondents also argue that *Austin* cannot be read to require corporations to give up part of their entitlement to First Amendment rights as a condition of accepting state-conferred economic advantages. *See* Respondents' Brief, at 11. The issue here and in *Austin*, however, is not the diminution of corporate rights, but whether the state's interest in imposing a particular restriction on political speech is compelling. As the *Austin* Court held, Michigan had a compelling interest in "*counterbalanc[ing]* those advantages unique to the corporate form. . . ." [Emphasis added.] 110 S.Ct. at 1400. California likewise has a compelling interest in counterbalancing, in the nonpartisan context, those political advantages unique to the ballot-qualified parties.

Amici assert that Petitioners' claims regarding the disproportionate political influence granted to official parties are "demonstrably wrong." As proof, they assert

that while the California Democratic Party and the California Peace and Freedom Party both enjoy the same statutory advantages, they have "grossly disparate" influence. *See* Amici's brief, at 15-16. However, the record does not establish that the minor official parties are without influence in all locales. In Berkeley, California, for example, the influence of the Democratic or Republican Party may not exceed that of the Peace and Freedom Party. The First Amendment does not compel the state to test periodically the local influence of qualified parties and to confine its regulation to those which pass some unspecified standard.

The language of *Austin* confirms this point. In rejecting an argument that the Michigan statute was overinclusive because it banned independent campaign expenditures even by noninfluential corporations, the Court emphasized that it was concerned with the *potential* to distort the political process by means of state-conferred advantages. 110 S.Ct. at 1398, quoting *FEC v. National Right to Work Committee*, 459 U.S. 197, 209-210 (1982). It was precisely the potential for such advantages to be used to distort the nonpartisan electoral system which prompted the voters of California to place restrictions on campaign activities by the official parties.

For these reasons, and the reasons already presented, the Petition for Writ of Certiorari should be granted.

DATED: January 2, 1991

Respectfully submitted,

LOUISE H. RENNE
City Attorney
DENNIS AFTERGUT
THOMAS J. OWEN
Deputy City Attorneys

By LOUISE H. RENNE
City Attorney
Counsel of Record

Attorneys for Petitioners

APPENDIX A

[Excerpt from Lee, *The Politics of Nonpartisanship* (1960)]

[page 102]

* * *

THE STATEWIDE SCENE

How partisan are nonpartisan politics? What do local officials and party leaders think about the role of the party in city elections? These questions were made the object of the state-side survey. This question was asked: "In any election for *city* or *school* office in your city in the last *four* years, has there been any *public or openly visible activity* on the part of either political organization: county committee, local political clubs, party officials or representative, etc.?" Only eighteen (9 per cent) of the 192 cities indicated the existence of such activity; the larger the city the more frequent was an affirmative reply.

TABLE 31

Cities Reporting Political Organizations Active In City or School Elections

Size of city	Total number of cities	Per cent
Less than 10,000	90	2
10,000 – 50,000	82	13
50,000 and more	20	25
Total	192	9

Of the eighteen cities, one party or both were reported active in mayoralty campaigns in four cities; in

school-board campaigns in seven cities; and in city-council races in sixteen cities. (The relatively low figure for mayoralty races indicates the small number of separately elected mayors in the state.) Democratic activity

[page 103]

only was reported in five cities, Republican activity only in three cities, and both parties active in nine cities. (For one city, this phase of the question was not answered.)

Similar results were obtained from the questionnaire distributed to county central-committee chairman of both political parties. An almost identical question to that quoted above, but including consideration of county office, was asked. In 11 (25 per cent) of the 44 counties from which at least one questionnaire was returned, party organization activity in city, county, or school elections was reported. As did the larger city, the larger counties tended to report such activity more frequently.

TABLE 32

Counties Reporting Political Organizations Active in City, County, or School Elections

Size of county	Total number of counties	Per cent
Less than 25,000	14	14
25,000 – 100,000	22	18
100,000 and more	8	64
Total	44	25

In one county, the Republicans alone were reported active in three counties the Democrats only, in four counties both parties, and in three counties this part of the question was not answered. No relationship was apparent between the reported existence of party activity and the relative strength of the party in the county in terms of its percentage of the two-party registration. City, county, and school offices all appeared to command a similar interest, each being mentioned in five or six counties.

Table 33 shows the types of political activities reported in the questionnaires.

TABLE 33

Political Activity in City and Counties, by Party

Political activity	Republicans active		Democrats active	
	Cities	Counties	Cities	Counties
Public endorsement of candidates	5	1	8	3
Use of party precinct machinery	5	3	6	6
Use of funds or fund raising	6	4	3	3

[End of excerpt]